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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-238
	)	
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

AIRTOUCH PAGING

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February 9, 1998

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Summary

AirTouch generally supports the changes to the formal complaint rules adopted in the *Report and Order*. These changes will greatly benefit parties seeking resolution of their rights and obligations under the communications laws. The Commission erred in one critical respect, however: the Commission misconstrued the statutory deadline contained in Section 208(b)(1) of the Communications Act for action on complaints as applying only to a certain narrow category of complaints.

When Congress amended Section 208(b)(1) of the Act, Congress specifically established a five-month deadline for Commission action in a broad class of formal complaint proceedings. AirTouch seeks reconsideration of the Commission's findings and conclusions in the *Report and Order*, which are inconsistent with the plain language, structure, and purpose of the Act, to the extent that they undermine the statute and are inconsistent with Congressional intent.

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to Section 1.429(d) of the Commission's Rules, hereby petitions the Commission to reconsider certain conclusions in the *Report and Order*[1/] in the above-captioned proceeding. Specifically, AirTouch asks the Commission to reconsider the ruling that Section 208(b)(1) of the Communications Act of 1934, as amended (the "Act"), applies only to a narrow category of formal complaints brought under the Act. The following is respectfully shown:

1/ FCC 97-396, *Implementation of the Telecommunications Act of 1996 -- Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, released November 25, 1997.

I. Preliminary Statement

1. AirTouch generally supports the changes to the formal complaint rules adopted in the *Report and Order*. In particular, AirTouch supports the expedited time frames and procedures that will govern virtually all aspects of formal complaint proceedings under the new rules. These rules will greatly benefit parties seeking resolution of their rights and obligations under the communications laws, which will thereby foster competition and serve the public interest. The Commission erred in one critical respect, however: the Commission misconstrued the statutory deadline contained in Section 208(b)(1) of the Act for action on complaints as applying only to a certain narrow category of complaints. The Commission also did not properly implement this statutory timetable by putting into its rules specific deadlines for action by the Commission's staff that has delegated enforcement authority.

2. When Congress amended Section 208(b)(1) of the Act, as part of the Telecommunications Act of 1996 (the "1996 Act"), Congress specifically established a five-month deadline for Commission action in a broad class of formal complaint proceedings. AirTouch seeks reconsideration of the Commission's findings and conclusions in the *Report and Order*, to the extent that they undermine the statute and are inconsistent with Congressional intent.

II. The Commission Must Reconsider Its Conclusion that the Five-Month Deadline Imposed By Section 208(b)(1) Is Limited to a Narrow Category of Complaints

3. In the *Report and Order*, the Commission concluded that Section 208(b) "applies only to formal complaints which involve `investigations into the lawfulness of a charge, class, regulation, or practice' contained in tariffs filed with the Commission," *Report and Order*, para. 37, "those matters required to be in tariffs," *id.*, para. 35, and "those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation," *id.*, para. 37. These conclusions are based on a reading of the Act that is fundamentally at odds with basic principles of statutory construction.

4. Where the intent of Congress can be determined "using traditional tools of statutory construction," then that interpretation must be given effect. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 929 (D.C. Cir. 1993). The traditional tools of statutory construction "include examination of the statute's text, legislative history, and structure, ... as well as its purpose." *Bell Atlantic Tel. Cos. v. FCC*, 1997 U.S. App. LEXIS 36150, *8 (D.C. Cir., Dec. 23, 1997) (internal citations omitted). With respect to Section 208(b)(1) of the Act, the statutory text alone reveals Congressional intent, and nothing in the legislative history, structure, or purpose of the Act is inconsistent with the plain language of Section 208(b)(1).

1. The Language of Section 208(b)(1) Is Clear and Unambiguous

5. Section 208(b)(1), as amended by the 1996 Act, states: "the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed." 47 U.S.C. § 208(b)(1).[2/] According to the Commission, this "plain language" "establishes that the class of complaints subject to the deadline in Section 208(b)(1) is narrower than the class of complaints that can be filed under Section 208(a)," which entitles any person the right to "complain[] of anything done or omitted to be done ... in contravention of the provisions" of the Act. *Report and Order*, para. 34. The Commission then makes an untenable leap, comparing selective language of Section 208(b)(1) ("charge, classification, regulation, or practice") to the broad language of Section 208(a) ("anything done or omitted to be done") and concluding that "the deadline covers complaints related to the lawfulness of matters with respect to which the Commission could exercise its prescription power under Section 205" of the Act. *Report and Order*, para. 34.

6. Basic principles of statutory construction require that "every word Congress used" must be given effect, if possible. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The corollary to this principle is that words Congress did not use may not be

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2/ The language of Section 208(b)(1) was identical prior to its amendment by the 1996 Act, except that the deadline for Commission action was 12 months, or, in exceptional cases, 15 months.

added. Here, the Commission violated both tenets by both eliminating words from, and adding words to, the statute. In short, the Commission ignored the "plain language" of 208(b)(1).

7. Section 208(b)(1) states that the five-month deadline shall apply "with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice...." "Any investigation" encompasses more than just "an investigation into matters related to tariffs"; indeed, the Commission's duty under Section 208(a) to investigate matters complained of, is not limited to tariff matters. Similarly, the words "or practice" connote matters wholly unrelated to tariffs. The Commission's failure to acknowledge the distinction renders the words redundant, violating a canon of statutory construction. *See Gustafson v. Alloyd Co.*, 563 U.S. 561 (1995). By concluding that Section 208(b)(1) applies only to certain investigations — *i.e.*, those related to tariff matters — the Commission failed to give effect to "every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. at 339. And, the Commission's reading of the language as implying the word "tariff" simply does not comport with its obligation to interpret the "plain language" of the statute. Nowhere in Section 208(b)(1) did Congress refer to tariffs.[3/]

3/ In contrast, Congress has made explicit reference to tariffs in Section 203(a) of the Act ("Every common carrier ... shall file with the Commission ... schedules showing all charges....").

8. Furthermore, the phrase "charge, classification, regulation, or practice" contained in Section 208(b)(1) is virtually identical to language in other provisions of the Act that are not related solely to tariffs. The Commission concedes as much, citing Sections 201(b)[4/] and 202(a)[5/] — which include matters unrelated to tariffs — as well as Sections 203(a), 203(b), and 205(a). *Report and Order*, n.81. The fact that Section 208(b)(1) and Section 201(b) conform is significant: Section 201(b) is not limited to "the lawfulness of a charge, class, regulation, or practice contained in tariffs filed with the Commission," *Report and Order*, para. 37, but encompasses, without limitation, "all charges, practices, classifications, and regulation...." 47 U.S.C. § 201(b) (emphasis added). Likewise, the plain language of Section 208(b)(1) simply does not contain the limiting language which the Commission implies. The Commission's reading of Section 208(b)(1) effectively renders Section 201(b) irrelevant. The phrase "charge, classification, regulation, or practice" also appears in nearly identical form in Section 10(a)(1), which was enacted as part of the 1996 Act and grants the Commission forbearance authority, and in Section 2(b) of the Act, which, *inter alia*, establishes

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4/ Section 201(b) of the Act provides that "All charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

5/ Section 202(a) of the Act provides that "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services...." 47 U.S.C. § 202(a).

jurisdictional boundaries between the Commission and the States. The Commission cannot explain why the language "charge, classification, regulation, or practice" is subject to one interpretation for purposes of Section 208(b)(1), and to different interpretations for purposes of other sections of the Act.

9. The Commission also relies on Section 402(b)(4) of the 1996 Act, which states that the amendments to Section 208(b)(1) and 204(a)[6/] of the Act "shall apply with respect to any charge, classification, regulation, or practice filed on or after one year after the date of enactment of this Act." *Report and Order*, para. 35. According to the Commission, the word "filed" "connotes a tariff filing pursuant to Section 203...." *Id.* Assuming, *arguendo*, that this is so, it does not alter the plain language of Section 208(b)(1) itself, and the Commission cites no evidence that Congress intended Section 402(b)(4) of the 1996 Act (which is not part of the Act itself) to limit Section 208(b)(1). The purpose of Section 402(b)(4) is merely to give the Commission a one year hiatus from the obligation to resolve those complaints that arise from charges, practices, classification, or regulations "filed" with the Commission and to delay for one year the streamlined tariff revisions procedures of Section 204(a). Notably, while Congress used the word "filed" in Section 402(b)(4) of the 1996 Act, there is no similar reference to tariffs, either explicit or implicit, in Section 208(b)(1).

6/ Section 204(a), as amended, streamlined procedures for revising tariffs filed by local exchange carriers.

2. The Legislative History Does Not Support the Commission

10. Even where the legislative history is, "at best ... cryptic," the plain language of the statute controls. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1063 (D.C. Cir. 1995). Here, the legislative history of the 1996 Act simply is silent with respect to the types of complaint subject to the five-month deadline imposed by Section 208(b)(1). In any event, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989). The Commission's interpretation of Section 208(b)(1), which is at odds with the unambiguous statute, cannot be supported by any expression of Congressional intent outside the statutory text.[7/]

3. The Commission's Narrow Construction of Section 208(b)(1) Is Inconsistent with the Act's Structure

11. The Commission also relies on other amendments to the Act enacted as part of the 1996 Act to support its conclusion that Section 208(b)(1) applies only to a narrow class of complaints. Specifically, the Commission cites three new

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7/ Lacking any legislative history for the 1996 amendment to Section 208(b)(1), the Commission cites a Senate floor statement offered in support of the 1988 amendment to Section 208(b)(1). Even the FCC, however, concedes that such statements "are not the most probative evidence of Congressional intent underlying a statute." *Report and Order*, n.88. The reasons why such statements prove nothing are obvious even from the quoted language, which not only is internally inconsistent, but is inconsistent even with the Commission's interpretation of Section 208(b)(1) in the *Report and Order*. (According to Senator Inouye, a complaint that a carrier had not complied with the "terms" of its tariffs would not be subject to the deadline imposed by Section 208(b)(1).)

sections of the Act — Section 260(b), Section 271(d)(6)(B), and Section 275 — in which Congress provided specific deadlines for Commission action on complaints arising under those sections. The Commission thus implies that if Congress wanted to impose a deadline for Commission action on all types of complaints, it would have written into each provision of the Act a specific deadline for action on complaints arising under that section. What the Commission fails to acknowledge, however, is that in each of the 1996 Act provisions cited by the Commission, the deadline for Commission action is shorter than the five-month deadline in 208(b)(1).[8/] Thus, Congress specifically provided for less time where it deemed such expedition appropriate, but clearly intended that other complaints would be subject to the longer five-month period of Section 208(b)(1). Moreover, Section 208 — entitled "Complaints to the Commission" — is a section of general applicability to all complaints, whereas the other sections of the Act cited by the Commission concern discrete issues. By placing the five-month deadline in the general provision, and shorter deadlines in the specific provisions, Congress established a clear structure for the Commission to follow.

12. Further evidence that the Commission's interpretation of Section 208(b)(1) is fundamentally at odds with Congressional intent is evidenced by the Commission's conclusion that Section 208(b)(1) applies to "those matters that would have been included in tariffs but for the Commission's forbearance from tariff

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8/ *See* 47 U.S.C. §§ 260(b) (120 days), 271(d)(6)(B) (90 days), and 275 (120 days).

regulation." *Report and Order*, para. 37. By adding Section 10 to the Act, Congress effectively ratified the Commission's mandatory detariffing policy, which had been the subject of extensive litigation. There is no evidence that Congress intended to grant the Commission express authority to prohibit tariff filings — and at the same time limit Section 208(b)(1) to matters involving tariffs. The Commission simply supplies its own evidence, concluding that Section 208(b)(1) applies to matters that "would have been" in tariffs. This constitutes statutory interpretation at its most creative.[9/]

4. The Commission's Reading of Section 208(b)(1) Is Inconsistent with the Purposes of the 1996 Act

13. Revised Section 208(b)(1) was merely one provision in the most ambitious rewrite of the federal communications laws ever undertaken by Congress. Although Congress did not offer an explanation of the plain language of Section 208(b)(1) in the official legislative history of the 1996 Act, Congress was explicit about the intended effects of the new laws: to erect a "framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to

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9/ The Commission "infers" that Congress was "silen[t] as to deadlines for resolving complaints arising from other sections of the Act." *Report and Order*, para. 36. This inference turns principles of statutory construction upside down. Congress did speak, and precisely, on what deadlines apply for resolving complaints arising under other sections of the Act. The Commission simply chooses to ignore the plain language of Section 208(b)(1).

competition...." H. Cong. Rep. No. 104-458, U.S. Code Cong. & Admin. News, 104th Cong., 2d Sess., at 124.

14. Section 208(b)(1) must be read in conjunction with the 1996 Act's principal, overarching goal of spurring competition. As the Commission itself noted when it adopted the new formal complaint rules, "[p]rompt and effective enforcement of the Act and the Commission's rules is crucial to attaining the 1996 Act's goals of full and fair competition in all telecommunications markets." *Report and Order*, para. 1. Congress has given the Commission powers to enforce the telecommunications laws, and swift enforcement of those laws is fully consistent with promoting competition. The five-month deadline for Commission action established by Section 208(b)(1) thus is fully consistent with the purposes of the 1996 Act.[10/]

15. A real world example provides a simple illustration of the problem with the Commission's position. The Commission has jurisdiction over complaints by

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10/ Any objective review of the history of the Commission's treatment of formal complaints reveals the need for reform. There appears to be no dispute that the Commission's performance of its duties under Section 208(a) in the past has not been as prompt as many parties have desired. *See, e.g.*, Comments filed in response to *Public Notice*, DA 97-2178, by WorldCom, Inc., at pp. 5-6; the Association for Local Telecommunications Services, at pp. 1-3; the Competitive Telecommunications Association, at pp. 4-6; Teligent, Inc., at pp. 2-4; the Association of Directory Publishers, at pp. 2-3; the Telecommunications Resellers Association, at pp. 5-6; MCI, at pp. 4-5. In light of the goals of the 1996 Act, the need for expedited complaint resolution has never been more critical than at the present. The adoption of the new complaint rules is a significant step toward achieving these goals; at the same time, however, the Commission's narrow interpretation of Section 208(b)(1) is a step backward.

commercial mobile service radio ("CMRS") providers against incumbent LECs for alleged failures to provide interconnection upon reasonable request under Sections 201/202 and Section 332(c)(1)(B) of the Act. However, interconnection arrangements are not the subject of FCC tariffs. Under the Commission's interpretation, complaints about interconnection practices would not be subject to the five-month decision-making deadline established by Section 208(b)(1). This makes absolutely no sense, since the interconnection provisions of the 1996 Act represent a cornerstone of the legislation, as recognized by the Commission in its *First Report and Order* in CC Docket No. 96-98.[11/]

5. The Purported "Interpretations" of Section 208(b)(1) Are Not Controlling

16. The Commission's reference to previous "interpretations" of Section 208(b)(1) as "applicable only to complaints about matters contained in tariffs filed with the Commission," *Report and Order*, para. 32, cannot overcome the plain language of the Act. In fact, the purported interpretations of Section 208(b)(1) have no weight as precedent. The two letters cited by Commission — one by a former Chairman and one by a former Bureau Chief — both were addressed to lawmakers and were not issued in the context of any specific complaint proceeding. *See id.* And, they obviously are not probative of what Congress intended in 1996 when it amended Section 208(b)(1).

11/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996).

17. Of greater significance is evidence that the Commission and the Courts previously have at least implicitly accepted that 208(b)(1) is not restricted to matters "contained in tariffs" or "required to be in tariffs". For example, in 1989, shortly after Section 208(b)(1) was added to the Act, the Common Carrier Bureau ruled that several complaints alleging violations of Sections 201 and 202 of the Act were subject to the then-applicable twelve-month deadline. *See Illinois Bell Tel. Co.*, 4 FCC Rcd 2690 (Com. Car. Bur. 1989), paras. 2-3. And, when the Commission revised its complaint rules in 1993, it cited the 1988 amendment to Section 208(b)(1) but made no reference to any limitation on its applicability. *See In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd 2614, 2614-15 (1993). Recently, the Eighth Circuit Court of Appeals held that an interconnection agreement that is subject to the jurisdiction of the states constitutes a "classification[], practice[], or regulation[]" under Section 2(b) of the Act — which, as noted, is virtually identical to Section 208(b)(1). *Iowa Utils. Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997).

III. "Accelerated Docket" Procedures Are Not Necessary If the Commission Complies with Section 208(b)(1)

18. A proper interpretation of Section 208(b)(1) largely renders unnecessary the Commission's recent inquiry into whether it should adopt "Accelerated Docket" procedures for certain types of formal complaints. In response to that inquiry, the need for accelerated procedures was emphasized by every single commenter, with the

exception of incumbent local exchange carriers. Obviously, considerable staff resources would be devoted to resolving complaints on the Accelerated Docket, and the Commission appears ready to commit those resources. Those resources, however, should be used to resolve all complaints subject to the Section 208(b)(1) deadline. In this respect, AirTouch believes that the Accelerated Docket proceedings are not necessary, because the new formal complaint rules and the five-month deadline imposed by Section 208(b)(1) must and should apply more broadly than the Commission had acknowledged. While the new formal complaint rules adopted in this docket, including mandatory pre-filing settlement discussions and expedited briefing and discovery schedules, will greatly alleviate the burden on Commission's enforcement resources, the Commission should not refrain from dedicating whatever resources are necessary to the prompt, fair, and efficient resolution of all complaint proceedings.

IV. Conclusion

WHEREFORE, the foregoing premises duly considered, the Commission should reconsider its conclusions with respect to Section 208(b)(1) of the Act, which are inconsistent with the plain language and clear purpose of the Act, and should adopt a rule consistent with the plain language of that provision.

Respectfully submitted,

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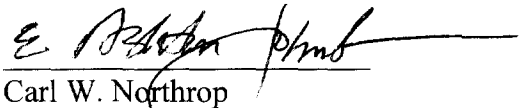
By: 

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